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**UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CITY AND COUNTY OF SAN FRANCISCO,  
 et al.,

Plaintiffs,

v.

PURDUE PHARMA L.P., et al.

Defendants.

Civil Case No.: 3:18-CV-07591-CRB

**DEFENDANTS' REPLY STATUS REPORT**

Hearing Date: February 26, 2020  
 Hearing Time: 12:00 p.m.  
 Hearing Place: Courtroom 6

Honorable Charles R. Breyer

Plaintiffs' Status Report (Dkt. 67) reinforces defendants' estimate that the parties will need approximately 18 months to conduct fact discovery of each other and of third parties, and that it would be premature to schedule additional case deadlines at this time. Plaintiffs estimate that they will need an additional six to nine months to complete just the narrow slice of discovery they intend to take of defendants who have already been subject to vast discovery demands in MDL 2804. Dkt. 67 at 3. With respect to the time needed for the majority of discovery that still needs to be conducted in this case – discovery of plaintiffs, of third parties, and of defendants who have not yet been subject to discovery in MDL 2804 or elsewhere – plaintiffs offer no estimate at all. But plaintiffs' six-to-nine-month estimate of the time needed to finish discovery that is already "substantially complete" suggests that defendants'

1 estimate of 18 months for *all* fact discovery – including the discovery that must start from scratch – is  
 2 reasonable, if not overly optimistic.

3 Plaintiffs are mistaken in their suggestion that the case may be compressed, and motion practice  
 4 obviated, in light of the fact that Judge Polster has ruled on the viability of Ohio municipalities' Ohio  
 5 common-law claims and on those plaintiffs' federal claims (to which he applied Sixth Circuit law).  
 6 Those rulings, which were made in different cases, are not "law of the case" in this case. Nor, in any  
 7 event, did Judge Polster address *any* claims brought under California or Ninth Circuit law, much less  
 8 claims asserted based on the allegations set forth in plaintiffs' complaint here.

9 Defendants briefly address these points below in response to plaintiffs' Status Report.

10 **I. Plaintiffs' Estimates Reinforce the Need for at Least 18 Months of Fact Discovery.**

11 Plaintiffs state that "[w]hile discovery of defendants is substantially complete," they still need six  
 12 categories of discovery from defendants and certain third parties to prepare their case for trial. Dkt. 67  
 13 at 3. Plaintiffs' report does not mention the fact that discovery of the City and County of San Francisco  
 14 has yet to begin; nor does it offer any estimate of how quickly or capably they will produce the  
 15 substantial amount of discovery they will be required to provide. As detailed in Defendants' Status  
 16 Report, that discovery will concern, *inter alia*, whether and to what extent defendants' alleged conduct  
 17 affected plaintiffs' governmental operations; when plaintiffs knew or should have known of their claims;  
 18 and whether plaintiffs can prove the necessary elements of causation (*see* Dkt. 66 at 5); as well as the 55  
 19 categories of damages plaintiffs apparently intend to seek (*see* Dkt. 66-2 at 3-4). Defendants'  
 20 experience in other jurisdictions – including Track One of MDL 2804 – is that county and municipal  
 21 plaintiffs face substantial hurdles in satisfying their discovery obligations. Plaintiffs offer no assurance  
 22 that they will fare any better.

23 Plaintiffs' Status Report also omits any mention of the extensive, jurisdiction-specific third-party  
 24 discovery Defendants will need to pursue in this case. *See* Dkt. 66 at 6-7 (describing necessary third-  
 25 party discovery of state and federal entities and third-party payors). This discovery, like the discovery  
 26 defendants must pursue from plaintiffs, has not yet begun.

27 Finally, plaintiffs' Status Report fails to mention that one of the defendants it has chosen to sue,  
 28 Hikma Pharmaceuticals USA Inc., is starting from square one, and another, Noramco, is not much

1 further along. As explained in defendants' Status Report, Hikma has not been required to produce any  
2 documents in any opioid-related litigation, nor has it even negotiated a scope of production or produced  
3 a single employee for deposition. Dkt. 66 at 3. Noramco is in a similar position. The Track One  
4 plaintiffs did not pursue any discovery against Noramco, and it was ultimately severed from Track One  
5 of MDL 2804. While Noramco has begun producing discovery in a few state cases, that discovery  
6 remains ongoing. And no party depositions have been taken of Noramco employees. Dkt. 66 at 3-4.  
7 Hikma and Noramco do not believe that discovery can be completed from them in the six-to-nine-month  
8 period plaintiffs suggest.

9       Once discovery opens, defendants intend to move forward expeditiously. But regardless of the  
10 parties' efforts, this case requires a schedule commensurate with its scope and complexity. Plaintiffs'  
11 estimated six to nine months may be realistic for them to finish discovery that is already "substantially  
12 complete." But it is unrealistic to suppose that defendants can complete discovery of plaintiffs and  
13 relevant third parties in anything close to that period of time.

14       If the Court is disinclined to stay discovery entirely pending resolution of motions to dismiss (as  
15 defendants suggested in their Status Report filed on February 19), defendants suggest in the alternative  
16 that discovery at least be limited during that initial period to production of documents by plaintiffs and  
17 third parties. That approach would ensure that efforts are appropriately concentrated in the initial phase  
18 on the discovery that will take the longest to complete, while still leaving plenty of time after the Court  
19 decides threshold motions to address the limited discovery for which plaintiffs expect to require a much  
20 shorter time period.

## 21 **II. Rulings of the MDL Court Are Not Binding Here.**

22       Plaintiffs suggest that "briefing on dispositive motions will be unnecessary or substantially  
23 limited," because Judge Polster ruled on motions to dismiss and for summary judgment concerning  
24 some of the MDL 2804 Track One Ohio municipality plaintiffs' common law and RICO claims  
25 (applying Ohio and Sixth Circuit law). Dkt. 67 at 2. That does not follow. The MDL court has never  
26 considered or ruled on dispositive motions in *this* case; nor has it ever had occasion to address the  
27 California and Ninth Circuit law that is binding here. Plaintiffs' Complaint asserts claims for public  
28 nuisance (Cal. Civ. Code §§ 3479-3480); unfair competition (Cal. Bus. & Prof. Code § 17200); false

advertising (Cal Bus. & Prof. Code § 17500); RICO (18 U.S.C. § 1962(c)-(d)); negligence; negligent misrepresentation; and fraudulent concealment. The Ohio Track One plaintiffs did not bring any claims under the California UCL or False Advertising Law or under California common law; indeed, they did not bring claims for unfair competition or false advertising even under Ohio law. Judge Polster therefore could not have ruled – and did not rule – on the viability of any of the California causes of action that make up the bulk of plaintiffs’ case. Nor did Judge Polster rule on any RICO claims under Ninth Circuit law, since he was bound to apply Sixth Circuit law to the Track One plaintiffs’ federal claims.

Plaintiffs’ passing suggestion that rulings of the MDL court with respect to the Track One cases are binding “law of the case” here is wrong.<sup>1</sup> The MDL Court has never made any substantive rulings in this case to which that doctrine could apply, and rulings made in *different* cases are irrelevant for this purpose. Cases consolidated in an MDL do not merge into a single case; rather they “ordinarily retain their separate identities.” *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 904 (2015). To invoke the law of the case doctrine, an earlier ruling must be *in the same case*. See, e.g., *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 268 n.18 (3d Cir. 2017) (error to view decision in separate MDL action by different plaintiffs as binding law of the case, a doctrine that “does not apply here because it only applies within a single litigation”); see also *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984) (“The doctrine of law of the case . . . typically applies to the same case when the parties in the subsequent proceeding were also the parties to the former . . . decision. This matter is not entirely the same case . . . [and accordingly the] doctrine does not apply in this matter.”); 18B Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction & Related Matters* § 4478 (4th ed. 2015) (“Law-of-the-case rules . . . do not apply between separate actions.”). Thus, because this case and the Track One cases are distinct, the law of the case doctrine does not apply.<sup>2</sup>

<sup>1</sup> A similar argument by the plaintiff in another case remanded from the MDL was recently rejected by Judge Alonso in the Northern District of Illinois. See *City of Chicago v. Purdue Pharma, L.P., et al.*, No. 14-CV-04361-JLA-YBK (N.D. Ill. Feb. 18, 2020).

<sup>2</sup> Even if this were the same case – which it clearly is not – the “law of the case” doctrine would not apply in any event to the interlocutory rulings made by the MDL court. See, e.g., *Peralta v. Dillard*,

Defendants are entitled to bring, and intend to bring in this case, motions to dismiss that must be decided under California and Ninth Circuit law, based on plaintiffs' claims in *this* case, and the unique facts alleged here. This is an important threshold stage in this case that will have an important impact on the shape and timing of subsequent proceedings.

\* \* \*

For the foregoing reasons, and for the reasons set forth in defendants' Status Report, defendants therefore respectfully request that the Court set deadlines only for briefing and a hearing on defendants' motions to dismiss, with further deadlines to be set following resolution of those motions.

DATED: February 24, 2020

Respectfully Submitted,

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744 F.3d 1076, 1088 (9th Cir. 2014) (en banc) ("the denial of a summary judgment motion is never law of the case"). Nor would it compel adherence to erroneous rulings. *See, e.g., Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018) ("The law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case."). Moreover, some parties, like Hikma, were not even parties in the Track One cases and had no opportunity to contest any rulings made in them. If and when necessary, defendants will be prepared to brief these issues in more detail.

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**ATTESTATION**

I, Sonya Winner, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

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